

The defendant was convicted on May 18, 1989 of murder in the first degree and sentenced to serve a life sentence. On Nov. 30, 1993, the defendant filed a petition for post-conviction relief.

The defendant raised as issues in his petition that:

1. The evidence on which he was convicted was constitutionally deficient.
2. The trial judge improperly instructed the jury on the essential elements of the crime.
3. Ineffective representation by counsel at trial and on appeal.

The trial judge denied relief and dismissed the petition. We affirm the judgment.

INSUFFICIENCY OF THE EVIDENCE

A post-conviction petition may not be used to test the sufficiency of the convicting evidence. *Workman v. State*, 868 S.W.2d 705 (Tenn. Crim. App. 1993). Merely because the petitioner construes an attack on the evidence as constitutional in character does not alter this rule.

To hold otherwise would open every trial for retrial in a post-conviction proceeding merely because a prisoner or some other person or persons do not agree with the verdict reached by the finder of fact in the original trial.

We, therefore, affirm the finding of the trial judge on this issue.

INSTRUCTIONS TO THE JURY

The trial judge at the convicting trial instructed the jury on the elements of first degree murder in the manner found to be erroneous in *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992). The defendant asks this Court to hold, as did the trial judge, that *Brown* is retroactive.

To qualify as a retroactive application of a subsequent ruling by the Supreme Court, the decision must have defined a constitutional right not previously known or which could not be asserted at the time of the original trial. TENN. CODE ANN. § 40-30-105.

Brown did not announce a new constitutional right of an accused. *Brown* only held

that it was imprudent to continue to use the standard instruction which tells a jury that "premeditation may be formed in an instant."

The trial judge held that *Brown* is retroactive and then did a harmless error analysis. We conclude the *Brown* ruling is not retroactive, *State v. Joe Nathan Person*, 1993 Tenn. Crim. App. No. 02C01-9205-CC-00106 (Jackson, Sept. 29, 1993), and decline to enter into a harmless error analysis.

We find the trial judge correctly found the defendant was not entitled to a new trial on this issue, although we make this finding on a different basis than did the trial judge.

INCOMPETENCY OF COUNSEL

Trial Issues

The defendant testified about a wide range of deficiencies by his counsel at trial. He testified the attorney did not present appropriate evidence or call cordial witnesses in his defense. Further, the defendant testified his counsel did not prepare him for trial and that the effort to defend on the basis of insanity was a flawed decision.

Trial counsel testified the evidence of the defendant's guilt was so overwhelming that a plea of insanity was the only viable defense available. Further, the attorney testified he visited the defendant as often as necessary to prepare him for trial.

The trial judge found there was no issue as to the petitioner's guilt and the defense of insanity was the only viable defense in the case. The trial judge found trial counsel's performance competent with the standards set out in *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975) and *Strickland v. Washington*, 467 U.S. 1267, 104 S. Ct. 3562 (1984). We find the evidence supports the finding of the trial judge.

Appellate Issues

The defendant claims counsel was ineffective for failure to raise the issue of the sufficiency of the convicting evidence and the alleged error of the trial judge in instructing the jury in the manner condemned in *Brown*.

The case was tried in 1989. At the time of the trial and appeal, *Brown* had not been decided. Counsel cannot be held incompetent on appeal for failing to attack an instruction

which had previously been held to be proper.

The trial judge found that the evidence of the defendant's guilt was unquestioned. Trial counsel testified there was no cause to question the sufficiency of the convicting evidence. Counsel cannot or should not be labeled incompetent for refusing to raise patently futile issues on appeal. We find the defendant had competent counsel on appeal.

The judgment of the trial court is affirmed.

John K. Byers, Senior Judge

CONCUR:

Joseph B. Jones, Judge

Joseph M. Tipton, Judge